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To Parties Interested in HFS 117:

The Department of Health and Family Services has been asked to provide guidance concerning copying fees to be charged for copies of health care records prior to the time that the new HFS 117 rule is established and becomes effective. Although the Department of Health and Family Services has certain rulemaking powers to establish fees on this topic, the Department has never been given any administrative authority to enforce those rules or to resolve conflicts that may occur between health care providers and record requesters in interpreting the statutes.

Nonetheless, this is the Department's attempt to describe the current state of the law governing fees for medical record copying.

The copy fee limit rules currently set forth in ch. HFS 117 of the Wisconsin Administrative Code were enacted pursuant to s. 908.03(6m)(d), Stats., which at the time the rules were created dealt exclusively with requests from attorneys for copies of health care records. At that time, the only mention of copy costs in the patient health care record statute language of s. 146.83, Stats., was a general reference to "reasonable cost", with no mention of any rules concerning costs.

Accordingly, the language promulgated in the HFS 117 rules referred only to the attorney requests under s. 908.03(6m). However, 2001 Wisconsin Act 109 has now amended ss. 146.83 and 908.03(6m)(d) in such a way that both statutes rely upon the same fee rules to be issued by this Department.

The HFS 117 rules will indeed be revised to reflect the statute changes. Until those revisions are issued, however, the only rules that currently exist on this subject remain the HFS 117 rules that were issued prior to enactment of Act 109.

The Department has drawn the following conclusions from Act 109:

1. Act 109, at its § 9123(4g) on page 257, calls for DHFS to present new rules to the Legislative Council by the first day of the 10th month beginning after the effective date of the subsection. Since Act 109 as a whole took effect in late July 2002, the first month beginning after the effective date of the § 9123(4g) language is August 2002, and the 10th month beginning after the effective date of that language is May 2003. Therefore, the Act 109 language declares that rules are to be submitted to the Legislative Council by May 1, 2003.
2. Some of the copy fee statute amendments created by Act 109 took effect immediately when the enactment as a whole took effect. Others took effect on January 1, 2003. The creation of s. 146.83(3m), Stats., and an amendment to s. 908.03(6m)(d) created by §523p of Act 109, are the items that took effect immediately. Amendments to ss. 146.83(1)(b) and (1)(c), and an amendment to s. 908.03(6m)(d) created by § 523q of Act

109, took effect on January 1, 2003. The special effective dates are set forth in § 9423(3f) of Act 109, on the enactment's page 295.

3. The nonstatutory language in Act 109's § 9123(4g), mentioned above, requires DHFS to establish an advisory committee to assist in development of the rules. The committee has been established and will be providing advice to the Department as rapidly as possible. Progress of the rule project will be reflected on the HFS 117 portion of the Department's website.
4. An amendment to s. 908.03(6m)(d) that took effect upon publication of Act 109 created language that clearly anticipated record requests from attorneys would be subject to the fee limits whether or not litigation had been commenced. Although the wording of the same statute was amended again on January 1 by another portion of Act 109, the change does not appear to retreat from the legislative expectation that attorney requests would be subject to the HFS 117 rules whether or not an action has been commenced.

Act 109 is less clear in indicating what impact the amendments to s. 146.83 have upon record copying for non-attorney requesters that takes place prior to publication of updated HFS 117 rules. As mentioned above, the Department cannot issue any binding pronouncement on the issue. If the HFS 117 rules do apply to non-attorney requests during this interim period and if those rules have indeed been improperly ignored, an affected record requester has the right to seek damages and/or injunctive relief in a court action against the health care provider pursuant to s. 146.84, Stats.

The text of provisions mentioned above can be obtained through the following links:

Wisconsin Statutes <http://www.legis.state.wi.us/rsb/stats.html>

2001 Wisconsin Act 109 <http://www.legis.state.wi.us/rsb/2acts.html>

HFS 117 rules <http://www.legis.state.wi.us/rsb/code/hfs/hfs110.html>

One final note. A federal enactment known as the Health Insurance Portability and Accountability Act (HIPAA) applies to health care providers and health plans if they fall within certain definitions set forth in federal regulations. Many (but not all) health care providers and health plans in Wisconsin are subject to those requirements. Federal HIPAA privacy requirements, when applicable, do contain some copy fee restrictions. The deadline for affected health care providers and health plans to implement the HIPAA privacy requirements is April 14, 2003. The HIPAA Privacy Rule, at 45 CFR 164.524(c)(4), limits the variety of costs that can be imposed when the individual patient or personal representative of the patient is the record requester. The federal Department of Health and Human Services, Office for Civil Rights, which will be enforcing the HIPAA privacy requirements, has issued interpretive guidelines that contain the following question and answer:

Q: If patients request copies of their medical records as permitted by the Privacy Rule, are they required to pay for the copies?

A: The Privacy Rule permits the covered entity to impose reasonable, cost-based fees. The fee may include only the cost of copying (including supplies and labor) and postage, if the patient requests that the copy be mailed. If the patient has agreed to receive a summary or explanation of his or her protected health information, the covered entity may also charge a fee for preparation of the summary or explanation. The fee may not include costs associated with searching for and retrieving the requested information. See 45 CFR 164.524.

The quoted material is from the first page of the “Miscellaneous Frequently Asked Questions” portion of the OCR privacy guidance document issued in December 2002. That document is available on the OCR website at <http://www.hhs.gov/ocr/hipaa/privacy.html>

Accordingly, under HIPAA, covered entities are prohibited from charging the patient or personal representative for the cost of searching for and retrieving records. The existing HFS 117 rules do not contain any language that contradicts the HIPAA fee limitations. When the HFS 117 rules are revised, any language chosen for the revisions will need to be structured so as to comply with the HIPAA restriction.